

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.E., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
HUDSON VALLEY HEALTH CARE SYSTEM,  
VETERANS ADMINISTRATION HEALTH  
CARE CENTER, Montrose, NY, Employer**

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**Docket No. 19-0470  
Issued: August 12, 2019**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 28, 2018 appellant filed a timely appeal from a September 25, 2018 merit decision and a November 8, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted March 28, 2018 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On March 29, 2018 appellant, then a 61-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that while in the performance of duty on March 28, 2018, he developed head, neck, low and middle back, and right hip pain when he was hit by a patient and knocked to the ground. He did not indicate whether he had stopped work.

In a report dated March 29, 2018, Dr. Alan Rios, an employing establishment Board-certified internist, noted that appellant was seen for left shoulder and back pain following an incident with a patient. Appellant had related falling to the floor after a patient swung and hit him on the left shoulder. Dr. Rios provided examination findings, but reported that appellant refused a medical work up and full physical examination and that he appeared to be in no acute distress.

In notes dated March 29, April 12, and 18, 2018, Dr. Michael A. Gott, a Board-certified orthopedic surgeon, related that appellant was disabled from work. In an April 18, 2018 note, he related that appellant had low back pain and was unable to work.

Dr. Gott, in an April 19, 2018 note, indicated that appellant was treated for right hip pain, acute right shoulder pain, and right-sided low back pain without sciatica. He related appellant's history of injury and advised that he was disabled from work due to his current work restrictions.

In a development letter dated April 30, 2018, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him of the factual and medical evidence necessary to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated June 19, 2018, OWCP denied appellant's claim, finding that the medical evidence of record did not provide a firm diagnosis causally related to the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received additional medical evidence.

In an encounter report dated March 29, 2018, Dr. Gott noted appellant's right hip pain, acute right shoulder pain, and acute right-sided low back pain without sciatica. A history of the accepted March 28, 2018 employment incident was noted and physical examination findings provided. Dr. Gott reviewed lumbar and right hip x-ray interpretations and found no lumbar fracture dislocation with some degenerative joint disease and no right hip dislocations or fractures and no significant arthritis. Under impression he noted shoulder pain, neck pain, and right hip and back contusion.

In a June 15, 2018 report, Nicole K. Shelly, a physician assistant, related that appellant was treated that day for right hip pain, acute right shoulder pain, and acute right-sided low back pain without sciatica. She noted appellant's March 28, 2018 employment incident, and provided work restrictions.

In a June 22, 2018 report, Dr. Gott again noted a March 28, 2018 history of injury and that appellant was receiving treatment for right hip pain, acute right shoulder pain, and low back right sided pain without sciatica. He recommended physical therapy and indicated that appellant was currently disabled from work.

On July 13, 2018 appellant requested reconsideration.

By decision dated September 25, 2018, OWCP denied modification of its prior decision, finding that the evidence submitted was insufficient to establish that a diagnosed medical condition was causally related to the accepted March 28, 2018 employment incident.

On November 2, 2018 appellant again requested reconsideration. Accompanying his request was an October 22, 2018 letter reminding him of his upcoming appointment with Dr. Gott.

By decision dated November 8, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period,<sup>3</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that

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<sup>3</sup> *J.C.*, Docket No. 18-1503 (issued May 2, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *E.S.*, Docket No. 18-1750 (issued March 11, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>5</sup> *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

allegedly occurred.<sup>6</sup> The second component is whether the employment incident caused a personal injury.<sup>7</sup>

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted March 28, 2018 employment incident.

Initially OWCP received a March 29, 2018 report from Dr. Rios who noted appellant's history of injury and noted appellant's complaints of left shoulder and back pain. The Board notes that pain is a symptom, not a compensable medical diagnosis.<sup>9</sup> The Board has held that a medical report is of no probative value if it does not provide a firm diagnosis of a particular medical condition, or offer a specific opinion as to whether the accepted employment incident caused or aggravated the claimed condition.<sup>10</sup> As Dr. Rios did not diagnose an actual medical condition causing appellant's symptoms, his reports lack probative value and are insufficient to establish the claim.<sup>11</sup>

OWCP also received multiple progress notes dated March 29, April 12 and 19, and June 22, 2018 from Dr. Gott. In several of these notes Dr. Gott merely related that appellant was disabled from work. As previously noted, lacking a firm diagnosis and opinion that the employment incident caused the diagnosed condition, these reports are of no probative value regarding causal relationship.<sup>12</sup> In several of his other notes, Dr. Gott only related appellant's history of injury and pain complaints, but again, pain is a symptom not a compensable diagnosis.<sup>13</sup> These notes are therefore insufficient to establish appellant's claim.

In a report dated March 29, 2018 Dr. Gott reviewed lumbar and right hip x-ray interpretations and noted degenerative joint disease and a right hip and back contusion. However, he offered no opinion regarding the cause of those diagnoses. The Board has held that medical

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<sup>6</sup> *J.C.*, *supra* note 3; *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

<sup>9</sup> *J.C.*, *supra* note 3; *C.M.*, Docket No. 18-0146 (issued August 16, 2018); *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>10</sup> *See M.J.*, Docket No. 18-1114 (issued February 5, 2019).

<sup>11</sup> *See T.J.*, Docket No. 18-1500 (issued May 1, 2019); *D.K.*, Docket No. 17-1186 (issued June 11, 2018).

<sup>12</sup> *See supra* note 10.

<sup>13</sup> *Id.*

evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>14</sup>

OWCP also received a report from a physician assistant dated June 15, 2018 report. This report, however, is of no probative value as physician assistants are not considered physicians as defined under FECA.<sup>15</sup> Consequently, this report is insufficient to establish appellant's claim.

For the reasons set forth above, the medical evidence of record is insufficient to establish diagnosed right hip and lumbar conditions causally related to the accepted March 28, 2018 employment incident. Therefore, appellant has not met his burden of proof to establish an employment-related injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>16</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>17</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>18</sup> Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>19</sup>

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<sup>14</sup> *R.Z.*, Docket No. 19-0408 (issued June 26 2019); *P.S.*, Docket No. 18-1222 (issued January 8, 2019).

<sup>15</sup> 5 U.S.C. § 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *M.M.*, Docket No. 18-1096 (issued December 14, 2018); *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

<sup>16</sup> 5 U.S.C. § 8128(a).

<sup>17</sup> 20 C.F.R. § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>18</sup> *Id.* at 10.606(b)(3).

<sup>19</sup> *Id.* at § 10.608(b).

## ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

With his timely request for reconsideration, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by OWCP. Consequently he is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant has not submitted any such evidence in this case.<sup>20</sup> Appellant only submitted an October 22, 2018 medical appointment reminder with his request for reconsideration. The submission of this factual evidence does not require reopening of his claim for review of the merits of the claim because this evidence is irrelevant to the underlying issue of causal relationship. As noted, the underlying issue of the present case is medical in nature, *i.e.* whether appellant submitted medical evidence sufficient to establish causal relationship between a diagnosed medical condition and the accepted March 28, 2018 employment incident. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>21</sup> Thus, appellant is also not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted March 28, 2018 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C § 8128(a).

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<sup>20</sup> *B.T.*, Docket No. 18-1397 (issued January 15, 2019); 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>21</sup> *T.B.* Docket No. 19-0029 (issued June 21, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 8 and September 25, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board